

The Honorable Marc L. Barreca
Chapter 11
Hearing Date: March 12, 2019
Hearing Time: 10:00 a.m.
Hearing Location: Seattle, Room 7106

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Re:

NATURAL MOLECULAR TESTING
CORPORATION,

Debtor.

No. 13-19298-MLB

Beau Fessenden's Supplemental
Submission (per Court's Minute Order
dated March 12, 2019)

A. Except when expressly recognized by statute, recoupment is an equitable doctrine and the court must not reward inequitable conduct.

Under Washington law, unless based on a statute, recoupment is an equitable principle. *Seattle First Nat. Bank, N.A. v. Siebol*, 64 Wn. App. 401, 408, 824 P.2d 1252, 1256 (1992); *Tingvall v. U.S. Bank*, 199 Wn.App. 1011 (2017) (unpublished, non-binding – cited under GR 14.1). “It is a well established rule that an equitable remedy is an extraordinary, not ordinary form of relief. Henry L. McClintock, Handbook of the Principles of Equity § 22, at 47 (2d ed.1948). A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is

1 inadequate." *Sorenson v. Pyeatt*, 158 Wash.2d at 531, 146 P.3d at 1176. "A court being
2 asked to do equity should always consider whether the petitioning party has acted in
3 bad faith or with unclean hands." In re GGW Brands, LLC, 2:13-BK-15130-SK, 2013 WL
4 6906375, at *26 (Bankr. C.D. Cal. Nov. 15, 2013). With respect to the Settlement
5 Agreement, including the bungled sale of Normandy Park (fortunately saved by the
6 court), the Trustee has failed to act in good faith and with clean hands; hence, the court
7 should deny the Trustee an equitable remedy.
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9 **B.** The Estate waived its right to recoupment by agreeing not to execute on the
judgment.

10 "A contractual provision which provides that a party waives the right to assert a
11 setoff or counterclaim is rare; however, such a right may be waived." *Loader Leasing*
12 *Corp. v. Kearns*, 83 F.R.D. 202, 203 (W.D. Pa. 1979). "In Georgia, the right of setoff, both
13 at law and in equity, is preserved by statute. But this is a right which may be waived."
14 *Solid Waste Mgmt. Auth. of Crisp Cty. v. Transwaste Servs., Inc.*, 247 Ga. App. 29, 30, 543
15 S.E.2d 98, 99 (2000). In paragraph two of the Settlement Agreement, the Trustee waived
16 any right to recoupment. He did so by agreeing to not "enforce the judgment provided
17 that Fessenden is performing all of his obligations pursuant to this Agreement." The
18 essence of the Settlement Agreements was three acts called "Settlement Payments." The
19 Trustee has now admitted that Mr. Fessenden completely complied with Settlement
20 Payment no. 1 (amended tax returns) and Settlement Payment no. 3 (Normandy Park
21 proceeds).
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1 Still, the trustee recently asserted that Mr. Fessenden did not comply with his
2 obligations to sell Orondo. The Trustee's assertion is difficult to reconcile with the
3 Estate's monthly financial reports and contradicts the Estate's representations made to
4 Judge Coughenour. Yet the court appeared to request some additional argument on the
5 manner in which paragraph 9 of the Settlement Agreement was to operate. First, the
6 Orondo "Settlement Payment" was to be made contemporaneously with closing (which
7 it was). Second, Fessenden's obligation was "to market the Orondo Residence for a sale
8 that will result in Net Proceeds to the Trustee of not less than one million four hundred
9 thousand dollars (\$1,400,000), which shall be paid to the Trustee at closing as a
10 settlement payment. The Estate's attorney admitted to the court during argument that
11 Mr. Fessenden marketed the Orondo property to result in a sale for which the Estate
12 would receive at least \$1,400,000. The court expressed a concern: the agreement should
13 not be interpreted in a manner that would have allowed Mr. Fessenden to sell Orondo
14 for one dollar. But the agreement did not allow that to occur: Mr. Fessenden had
15 previously given the Estate a deed of trust on Orondo. *See recitals*, p. 2. Thus, Mr.
16 Fessenden could not sell Orondo without the Estate's approval and the Estate with full
17 knowledge of the outstanding property taxes and expenses of sale, approved the sale.
18 The May 31, 2017 date is of no consequence. Its only significance was that the Estate
19 could have filed its deed in lieu of foreclosure on that date and had greater control over
20 the sales process. Orondo closed on June 2, 2017, eliminating the need to file a deed in
21 lieu.
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1 C. The court should disregard the Trustee's attempt to introduce more evidence and
2 determine appropriate action to enforce the court's authority.

3 At the recent hearing, while at counsel table, the Trustee attempted to interject
4 unsworn testimony. The court sustained a prompt objection. Both during argument and
5 when allowing Mr. Fessenden to submit this pleading, the court made clear that no
6 further evidence was to be submitted. The Trustee disrespected the court's authority by
7 disregarding the court's instructions. Without even bothering to seek leave, the Trustee
8 filed a "Supplemental Declaration" (docket 1081). It is also rife with hearsay and
9 contains matters for which the Trustee lacks personal knowledge.

10 But it is notable in two respects. Mr. Calvert testifies that he was personally
11 involved in the negotiations of the settlement agreement and hence familiar with its
12 terms. Moreover, Mr. Calvert attached an email he received in August 2016. The email
13 discloses that \$33,400 "in delinquent property taxes that go back almost three years"
14 existed on the Orondo property. (Thus, Mr. Calvert knew, when he approved the
15 Orondo sale, that the Net Proceeds to the Estate would be \$33,400 lower than they
16 otherwise would have.) After receiving this email, Mr. Calvert submitted sworn
17 testimony in conjunction with the estate's motion to reform the deed. Mr. Calvert
18 testified that he had "read the motion and agree with the factual statements contained
19 therein." Dkt. 941, p. 1. One of the factual statements in the motion was "Fessenden
20 defaulted on his obligations under the Settlement Agreement at a minimum by:
21 ...Failing to pay property taxes for the period of 2013 through 2017..." Dkt. 940, p. 4.
22 The court is thoroughly familiar with the Settlement Agreement. Mr. Calvert's
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1 testimony is false because the “fact” in the motion is false. Mr. Calvert knew it was false
2 and the Estate repeated this falsehood on numerous occasions. It is not “advocacy” to
3 make patently untrue assertions and an untrue statement in sworn testimony can
4 constitute perjury.

5 Another bankruptcy judge in this district has previously found Mr. Calvert’s
6 testimony to be not credible and a cause of “great concern.” Case 10-17952-KAO, Dkt.
7 1122, p. 11 (6/14/2013) (“Although this Court finds...his conflicting testimony
8 described above is of great concern to this Court.”) The court went on to state that
9 “Moss Adams has discredited the Trustee’s testimony on this issue. Accordingly, while
10 the Court will not disturb its ruling on contempt, the Court concludes that the Trustee
11 should not be permitted to recovery any additional compensation.” Dkt. 1122, p. 12.

13 Although a good starting point, a financial penalty alone may be insufficient to
14 cause a change in what appears to be a pattern by this Trustee with respect to sworn
15 testimony and compliance with the court’s instructions and orders.

16 Respectfully submitted this 25th day of March, 2019.

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*Attorneys for Beau R. Fessenden, individually and his
marital community*

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered E-Service Recipients:

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of March, 2019, at Seattle, Washington.

By: s/Irina Kinyon

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